Filed 2/2/05 P. v. Montano CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROCHELLE MONTANO,

Defendant and Appellant.

F044184

(Super. Ct. No. 02-89777)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Gerald Sevier, Judge.

David P. Lampkin, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Brian Alvarez and Connie A. Proctor, Deputy Attorneys General, for Plaintiff and Respondent.

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STATEMENT OF THE CASE

On May 9, 2003, the Tulare County District Attorney filed an information in superior court charging appellant Rochelle Montano as follows: count I—welfare fraud in the form of aid by misrepresentation (Welf. & Inst. Code, § 10980, subd. (c)(2)); and count II—perjury by false application for aid (Pen. Code, § 118).

On May 16, 2003, appellant was arraigned and pleaded not guilty to the charges.

On August 26, 2003, jury trial commenced.

On August 29, 2003, the jury returned verdicts finding appellant guilty of count II but not guilty of count I or a lesser included offense of count I.

On September 26, 2003, the superior court denied appellant's motion for new trial.

On October 22, 2003, the court conducted a sentencing hearing and placed appellant on probation for a term of five years, subject to a number of conditions, including the service of 180 days in county jail.

On October 27, 2003, appellant filed a timely notice of appeal.

STATEEMENT OF FACTS

Appellant and her boyfriend, Bruce Johnson, had four children together. The children were born in 1995, 1997, 1999, and 2001, respectively. From December 1999 through May 2001, appellant lived with her children in an apartment on West Meadow Drive in Tulare. In May 2001, she moved to a duplex on South Maricopa Street in the same city. Appellant received cash aid, food stamps, and Medi-Cal from December 1999 through October 2001.

Appellant, Johnson, and their children would travel together. At home, Johnson regularly sat outside on the porch with the children, took out the trash, and did household chores. Maria Campos, a neighbor, said she saw Johnson at the apartment every day. He received important mail, such as correspondence and documents from the superior court and probation department, at the apartment. Johnson ate his meals at the apartment and had friends come and visit him there. He sometimes babysat the children, but the children spent most of their time with appellant. Tulare Police Officer Jason Lott visited appellant's duplex at 3:15 a.m. on October 2, 2001, and said Johnson kept clothes in the duplex bedroom.

Maria Campos lived in the same apartment building as appellant from 1999 to 2001. When Campos moved from the complex, she continued to visit each Monday

through Friday until 10:00 p.m. to babysit her brothers. Campos said she saw appellant and Johnson every day at the complex. She also saw them argue. Campos would often see Johnson smoking outside the apartment or visiting with his friends. She also said Johnson would be outside the apartment at different times during the day and evening.

Cynthia McGee also lived in the Meadow Drive apartments. Appellant lived next door to McGee from June 1999 to June 2001 and McGee saw Johnson almost every other day. She also saw him at the apartment at different times of the day and evening.

At 10:30 p.m. on November 30, 2000, Tulare Police Officer Troy Barker responded to a domestic violence incident at appellant's Meadow Drive apartment. Appellant told Barker that she and Johnson had been living together for about six months and they had three children together. On December 8, 2000, Tulare Police Officer Dave Frost interviewed appellant at the Meadow Drive apartment. During the interview, appellant told Frost that Johnson had been living with her prior to the November domestic violence incident.

Between May and November 2001, Georgina Carnes lived in the other half of appellant's duplex. Carnes saw Johnson about two or three times a week while she lived in the duplex. She saw him walking with appellant, washing her car, and doing chores around the house. During Carnes's residency in the duplex, appellant already had children and was pregnant with another child.

On one occasion, Carnes did not see Johnson for several weeks and appellant told her he was out of state. Late in the evening of October 1, 2001, Carnes heard appellant and Johnson arguing in the back bedroom of their unit. Carnes's husband called the police. Police officers arrived, found Johnson in the back bedroom, and noticed men's clothing in that bedroom. Appellant told police she and Johnson had been "living together off and on for approximately seven years and … he was living there with her."

At trial, Johnson admitted he lived and received his mail at the Meadow Drive apartment during the time appellant lived there. He also received mail at the apartments

of his mother and grandmother. He stayed at appellant's residence for one to three months at a time. After a month or two, he and appellant would get into a fight and he would go to his mother's house. Johnson explained he would stay at his mother's house for a week or two and then go back to appellant's house. He was incarcerated from March 28 to June 2, 2000. Upon release from prison, Johnson moved back to the Meadow Drive apartment for approximately one month. After doing so, he stayed with his mother for two or three weeks and then returned to appellant's apartment.

When appellant moved to the Maricopa duplex, Johnson lived there for about one month during January and February. He continued the same pattern of going to his mother's house for two or three weeks and then moving back in with appellant. Johnson said he was staying at the duplex when Carnes's husband called Tulare police in October 2001.

Johnson occasionally worked from 1999 through 2001. For about a month or two during this period, he babysat the children two or three days a week while appellant went to work.

In August 1999, 2000, and 2001, appellant signed a "Statement of Facts" (form SAWS-2) under penalty of perjury for cash aid, food stamps, and Medi-Cal. Eligibility Worker Veronica Diaz said the Statement of Facts is used to determine whether an aid recipient remains eligible to receive cash aid. When appellant originally sought welfare, she completed an application and Statement of Facts. She then had an appointment with Diaz, who read the relevant rights and responsibilities to her and explained anything she did not understand. Appellant concurrently signed a document entitled "Rights and Responsibility" (form SAWS-2A) with her initial Statement of Facts.

According to Diaz, appellant's responsibilities included reporting any changes in the household, such as whether anyone came in or out of the home or whether appellant started or left a job. The Statement of Facts form specifically inquired: "Does the other

parent of the children or unborn live with you?" Appellant answered under penalty of perjury, "no." Appellant also told Diaz that no other adults lived in her home.

In addition to Rights and Responsibility forms, appellant signed "Monthly Eligibility Reports" (form CA-7). One question on those reports asked: "Did anyone move into or out of your home, or did you move in with someone else? Include: newborns; temporary absences; anyone who died, entered or left a hospital, etc." Appellant checked the "no" box for that question. Russell Fulkes, a family support investigator with the Tulare County District Attorney's Office, contacted appellant on December 28, 2001, at the South Maricopa residence. Appellant told Fulkes that Johnson did not live with her. She did admit to Fulkes that Johnson slept at her house several nights each week. Appellant was aware that she was supposed to report anyone "coming or going, moving in or out of the home." Appellant was supposed to report such changes within five days. Eligibility Worker Diaz said appellant's eligibility for cash aid was based upon the absence of Johnson from the home.

Appellant received food stamps and cashed welfare checks each month from December 1999 through October 2001. She received $10,075 in cash aid and $5,141 in food stamps during that period (excluding April and May 2000). Karen Moore, the custodian of records for the Tulare County Department of Human Services, said appellant did not report that Johnson was living with her during that time period and would not have been eligible for aid had she reported he was living with her.

Eligibility Worker Lorraine Rodriguez said a parent who lives in a home periodically is not considered "continually absent" for purposes of determining eligibility for aid. Karen Moore said if the other parent is babysitting for the children, it may affect the eligibility of the parent receiving aid. Moore testified that aid based upon "absent parent deprivation" means that the other parent "is not in the home contributing to the physical care or emotional care or monetary care of the child." She explained that if the other parent is contributing to only one of these factors, that is enough to determine that

aid was given. Moore said an aid recipient should report if the other parent is babysitting or otherwise taking care of the children. When asked to define parental "care and control," Moore said it means decision-making, i.e., having the authority to take the child to a doctor if he or she is hurt, deciding what the child eats, or when the child eats or sleeps.

Fulkes contacted appellant again on February 5, 2002, and told her he was inquiring into welfare fraud. Appellant voluntarily told Fulkes that Johnson did not reside at her apartment and did not contribute anything to her household. She said Johnson came to watch the children, eat, and that he sometimes spent the night there.

Defense

Appellant testified on her own behalf. She said she began receiving aid in August 1998. She admitted filling out the eligibility forms and the monthly reports. When appellant started working on November 30, 1999, she reported the income from her job. Appellant believed she would receive more aid if she reported that Johnson was unemployed and living in her home. She admitted Johnson was at her home "very frequently" and said he provided childcare while appellant worked outside the home. She characterized the childcare as off and on and acknowledged that Johnson was not particularly reliable. She said there were periods of time when he was incarcerated. On one occasion, he went to the State of Washington for several months without giving an explanation.

Johnson also slept at her home up to three nights each week. However, she claimed he never moved in and did not live with the children and her as a family unit. Appellant acknowledged that she and Johnson had been together for more than seven years and that Johnson is the father of each of her four children. She said Johnson was at her house when Investigator Russell Fulkes visited because she had recently delivered her fourth baby and needed help. Appellant did not remember whether she told various investigators who testified that Johnson lived with her.

Appellant acknowledged filling out many forms. She claimed that no one ever explained the concept of "absent parent" or what it meant for another person to "move in" with her until the instant proceedings commenced. Appellant said Johnson was incarcerated when she first received aid and was told that Johnson was an absent parent because he was not in the home. Appellant said the case workers never explained the meaning of "absent parent."

Appellant recalled speaking to Tulare Police Officer Jason Lott, but not to Tulare Police Officer Troy Barker or Corporal Dave Frost. She told Officer Lott she lived in her home and had been with Johnson for seven years. She said Lott made the assumption that Johnson was living with her. She did not recall any officer asking whether Johnson lived with her and she did not tell any officer that Johnson did live with her.

DISCUSSION

I.

THE TERMS "LIVE WITH" AND "MOVE IN"

Appellant contends:

> "Appellant was convicted of perjury for declaring under penalty of perjury that Johnson had not 'moved in' and did not 'live with' her. As appellant will ... show, the terms 'move in' and 'live with' are ambiguous, in that, under at least one reasonable interpretation of the terms and one reasonable view of the evidence, Johnson had not 'moved in' with appellant and did not 'live with' her. Under this interpretation and view, appellant did not commit perjury. There is no evidence that appellant understood the term in another way that would make her declarations false. Therefore, the conviction of perjury must be reversed for insufficient evidence and denial of due process."

Count II of the information stated:

> "Between the 1st day of December, 1999 and the 30th day of November, 2001, in the above named Judicial District, the crime of PURJURY [*sic*] BY FALSE APPLICATION FOR AID, in violation of Penal Code Section PC118, a FELONY, was committed by ROCHELLE MONIQUE MONTANO, who being a person who testified, declared, deposed, and

certified under oath and under penalty of perjury on an application and inquiry for renewal of aid and medical assistance provided for in Welfare and Institutions Code Section 11265 that said DEFENDANT and applicant met and continued to meet the specified conditions of eligibility for said aid and medical assistance, did knowingly, and with intent to deceive, state as true on said application and in response to said inquiry a material matter which he/she knew to be false, to wit: FAILURE TO REPORT THAT THE FATHER OF DEFENDANT'S CHILDREN WAS PRESENT IN THE HOME."

Penal Code section 118, as charged in count II of the information, states in relevant part:

"(a) Every person who, having taken an oath that he or she will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which the oath may by law of the State of California be administered, willfully and contrary to the oath, states as true any material matter which he or she knows to be false, and every person who testifies, declares, deposes, or certifies under penalty of perjury in any of the cases in which the testimony, declarations, depositions, or certification is permitted by law of the Sate of California under penalty of perjury and willfully states as true any material matter which he or she knows to be false, is guilty of perjury."

The trial court instructed the jury in CALJIC No. 7.21 (perjury under "penalty of perjury"—defined) as follows:

"Defendant is accused in Count 2 of having committed the crime of perjury, a violation of Section 118 of the Penal Code. Every person who declares under penalty of perjury in any of the cases in which a declaration under penalty of perjury is permitted by law willfully states as true any material fact which he or she knows to be false is guilty of the crime of perjury in violation of Penal Code Section 1118 [*sic*]. [¶]...[¶]

"The term 'material' is defined elsewhere in these instructions, and that's special instruction number C which I will read later.

"It is alleged that the defendant made the following false statements: One, the other parent of the children did not live with her; two, no one moved into or out of her house.

"In order to prove this crime, each of the following elements must be proved beyond a reasonable doubt: One, a person declared under penalty of

> perjury and willfully stated as true a matter which was false. The declaration under penalty of perjury was made in circumstances permitted by law and was signed by the defendant and was delivered to another person by the defendant with the specific intent that it be uttered or published as true; three, the defendant knew the statement was false and was being made under penalty of perjury; four, the false statement was material; and five, the defendant in making the statement had the specific intent to declare falsely under penalty of perjury."

CALJIC No. 7.24 (perjury--willfulness and knowledge required) as read to the jury stated:

> "Perjury requires that the statement be made willfully by a person who knows that the statement is being made under penalty of perjury and who knows or believes the statement is false. A statement made under actual mistake and in belief that it is true is not perjury even though the statement is false.
>
> "The word 'willfully' simply means a purpose or willingness to commit the act or the omission referred to."

On appeal, appellant contends the terms "move in" and "live with" are ambiguous and there was substantial evidence that, in the strict sense of the terms, Johnson did not "move in" or "live with" her on a permanent basis:

> "… Johnson testified that, during the relevant period, he stayed with his mother, but he would go to appellant's apartment for a month or two, until the fighting between them became so bad he would return to his mother's apartment. He said they argued every day. The investigator, Fulkes, testified that appellant told him that Johnson did not live there, although he stayed there from time to time, about three nights a week. From this testimony, the jury might well have found that Johnson stayed at appellant's apartment when it suited him but had no intention to make appellant's apartment his home. If asked, the jury might have further found that where Johnson really 'lived' was at his mother's apartment, a nest which, there was evidence, he had not flown.
>
> "The testimony of the several neighbors is not inconsistent with this view. It established no more than that Johnson was at appellant's apartment often, sometimes at night. It is ironic that Campos's testimony that Johnson was at appellant's apartment 'every day' was offered to prove that Johnson 'lived' there, while Campos described herself as having 'moved away'

> from the apartment complex even though she was still there 'every day' to baby-sit her siblings.
>
> "For these reasons, a reasonable jury could have found that, in the strict sense of the terms, Johnson did not 'move in' or 'live with' appellant. [¶]...[¶]
>
> "There is no substantial evidence that appellant understood the questions in the welfare forms about 'living with' and 'moving in' in a sense other than the strict sense. Appellant's testimony that 'Live in is when you're living together; clothes are in the home. You sleep there daily, eat there daily, shower there daily' is consistent with a strict sense of 'live with.'
>
> "There is evidence that appellant told Officers Barker, Frost, and Lott that Johnson lived with her or had lived with her. Those conversations concerned domestic violence, not welfare. Assuming that the jury credited the officers' testimony, there is no evidence of the sense in which the terms were used in those conversations."

In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence. Substantial evidence is that which is reasonable, credible, and of such solid value that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. The federal standard of review is to the same effect. Upon principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt. Rather, it entails a determination whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. (*People v. Stone* (1999) 75 Cal.App.4th 707, 713.)

Although it is the duty of the jury to acquit a defendant if it finds the circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt. If the circumstances reasonably

justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. (*People v. Stone, supra,* 75 Cal.App.4th at p. 713.) The focus of the substantial evidence test is on the whole record of evidence presented to the trier of fact, rather than on isolated bits of evidence. The substantial evidence rule applies when an appellate court is reviewing on appeal the sufficiency of the evidence to support a conviction. (*People v. Cuevas* (1995) 12 Cal.4th 252, 260-261.)

In California the elements of perjury are a willful statement, under oath, of any material matter that the witness knows to be false. (*People v. Howard* (1993) 17 Cal.App.4th 999, 1004; *People v. Guasti* (1952) 110 Cal.App.2d 456, 463.) The word "willful" is used in the sense of "knowingly" or "intentionally." To sustain a perjury charge, it is not necessary that the false statement be made for the purpose of injuring another. Whether a false statement has been made willfully or as the result of an honest mistake is a question of fact solely for the jury to decide. (*People v. Darcy* (1943) 59 Cal.App.2d 342, 348, disapproved on another point in *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301, fn. 11.) In a perjury case, a defendant's actual state of mind cannot be directly proved. Thus, it is for the jury to say whether the defendant believed the truth of his or her statements when they were made. (*People v. Dixon* (1950) 99 Cal.App.2d 94, 96-97.) Since the jury is the sole judge of the credibility of the witnesses and the facts of the case, it is beyond the power of the reviewing court to interfere with the conclusions it has reached on the issue of willfulness. (*People v. McRae* (1967) 256 Cal.App.2d 95, 113.)

In the instant case, Johnson was the father of appellant's four children and appellant gave birth to the fourth child in 2001. Three neighbors testified that Johnson was at appellant's house on a daily basis, often cared for the children, and performed chores around the house. Appellant told police officers that she and Johnson had been living together off-and-on for seven years. At trial, Johnson admitted he lived with

appellant for two or three months at a time. He used her address to receive mail, received visitors at her residence, and kept his clothes in her bedroom. Johnson was arrested at appellant's home and was present on December 28, 2001, when Investigator Fulkes came to ask appellant questions. Fulkes specifically asked her if she remembered what she was required to report. Appellant told Fulkes, "'any changes to the household. I know you're supposed to report anyone coming or going, moving in or out of the home.'" Yet, appellant completed the Statements of Facts and Monthly Eligibility Reports under penalty of perjury and indicated no one had come into or out or moved into or out of her home.

Finally, the court instructed the jury in CALJIC No. 2.02 that "if the evidence as to any specific intent permits two reasonable interpretations, one of which points to the existence of the specific intent and the other to its absence, you must adopt that interpretation which points to its absence." Here, the jury found that appellant had the specific intent to make a false statement and implicitly determined that any defense claim that appellant did not understand the meaning of "move in" or "live with" was not a reasonable interpretation of the facts. Appellant concedes the terms "live with" and "move in" are common ones but are nevertheless imprecise. She submits, in the strict sense of the terms, Johnson did not "move in" or "live with" her because he lacked the intent to remain with her permanently. Once again, whether a statement made under oath was willfully and intentionally false is a question of fact for the trier to determine. (*People v. Meza* (1987) 188 Cal.App.3d 1631, 1647.) Under California law, it is the jury, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124-1126.)

Substantial evidence supports the jury's verdict that appellant was guilty of perjury based upon false statements made under oath in the Statements of Facts and Monthly Eligibility Reports.

II.

SPECIAL INSTRUCTION D

Appellant contends the court erred and defense counsel rendered ineffective assistance when the court gave People's "Special Instruction D," an instruction defining the administrative term "continued absence," without explaining the term was irrelevant to the perjury count.

Count I of the information charged:

> "Between the 1st day of December, 1999 and the 30th day of November, 2001, in the above named Judicial District, the crime of AID BY MISREPRESENTATION OVER $400, in violation of Welfare and Institutions Code Section WI10980 (C) (2), a FELONY, was committed by ROCHELLE MONIQUE MONTANO, who did unlawfully and by means of false statements, representations, impersonation and other fraudulent device, obtain and retain aid for SELF AND FAMILY, not in fact entitled thereto, in excess of Four Hundred Dollars ($400.00), to wit: FIFTEEN THOUSAND, TWO HUNDRED SIXTEEN ($15,216)[.]"

Welfare and Institutions Code section 11250 states in relevant part:

> "Aid, services, or both shall be granted under the provisions of this chapter, and subject to the regulations of the department, to families with related children under the age of 18 years, except as provided in Section 11253 [governing children attaining age 18], in need thereof because they have been deprived of parental support or care due to: [¶]...[¶]
>
> "(c) Continued absence of a parent from the home due to divorce, separation, desertion, or any other reason, except absence occasioned solely by reason of the performance of active duty in the uniformed services of the United States. 'Continued absence' exists when the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child, and the known or indefinite duration of the absence precludes counting on the parent's performance of the function of planning for the present support or care of the child. If these conditions exist, the parent may be absent for any reason, and may have left only recently or some time previously."

Appellant outlines the problem at trial in the following manner:

"Appellant was charged in Count 1 with welfare fraud and in Count 2 with perjury. Both counts require proof of a misstatement. In the perjury count, the jury was instructed that the misstatements in issue were appellant's denials that Johnson had 'moved in' or was 'living with' her. In the welfare fraud count, the instructions did not enumerate the alleged misstatements, but, in argument, the prosecutor relied on the same alleged misstatements as in the perjury count.

"The prosecutor at one point contended there was a third basis for conviction of Counts 1 and 2, namely, that defendant made misrepresentations that Johnson was 'absent.' As a result, during the evidentiary phase of the trial, the jury heard testimony from several witnesses about the regulatory term 'continued absence,' and the prosecutor prepared Special Instruction D, which sets forth the administrative definition of 'continued absence.' But, at some point, the prosecutor decided to limit the grounds on which she sought conviction of Counts 1 and 2 to the misstatements that Johnson had not 'moved in' with appellant and was not 'living with' her. Therefore, the instructions given before the jury commenced deliberations did not include Special Instruction D.

"During deliberations, the jury requested 'the form which gives Welfare's definition of being an absent parent.' In discussion with counsel outside the presence of the jury, the court initially resisted providing the form, because 'the definition of absent parent is not an issue as to any element that's before the court.' Defense counsel, however, argued that Special Instruction D should be given, because 'it's a defense that she believed him to be absent,' and he had touched on the term in his cross-examination of each of the disability workers. The prosecutor pointed out that the definition related to a basis for conviction she had chosen not to argue, but defense counsel said the definition 'goes right to [appellant's] state of mind when she's filling out those monthly eligibility reports and those annual reports.' The court began a question, 'But is there a nexus between the regulation that defines continued absence and if a person is ...,' but did not complete it. Defense counsel replied, 'I think there is a nexus, because ... you don't make a request for aid unless there is a deprivation, and ... one [kind of deprivation] includes ... absent parent.'

"The court said, 'I don't see how it really applies to Count 2 because Count 2 ... states the two misstatements that the People are relying on,' which were those concerning 'moving in' and 'living with.' The court continued, '[T]his definition would not apply to Count 2, but what I haven't considered is it might apply to Count 1.' Defense counsel argued it did apply to Count 1, 'because it's a misrepresentation for aid, and if she was

under the belief that he was absent like ... when she originally applied, this defines exactly what absent is.'

"The court said, 'I think I have to give it' and proceeded to bring the jury in and read Special Instruction D to the jury."

Special Instruction D states:

"Aid to Families with Dependent Children and Food Stamps Aid shall be granted under the provisions of the Welfare and Institutions Code and subject to the regulations of the State Department of Social Services to families with related children under the age of 18 years in need of such aid because they have been deprived of parental support or care.

"A child is considered deprived of parental support or care if: [¶] 1. Either parent is deceased. [¶] 2. Either parent is physically or mentally incapacitated. [¶] 3. The principal earner is unemployed. [¶] 4. Either parent is continually absent from the home in which the child is living.

"CONTINUED ABSENCE is defined as follows:

"'Continued Absence' exists when the natural parent is physically absent from the home, and the nature of the absence results in an interruption or termination of the parent's functioning as a provider of maintenance, physical care, or guidance for the child, regardless of the reason for the absence or the length of time the parent has been absent, and the known or indefinite duration of the absence precludes counting on the parent's performance in planning for the present support or care of the child.

"If such an interruption or termination of performance of parental responsibilities exists, 'continued absence' shall be considered to exist for purposes of eligibility for AFDC even if the parent remains in contact with the child through regular or frequent visitation. Regular or frequent visits with the child by a parent who is physically absent from the home shall not, in and of itself, prevent a determination that 'continued absence' exists. 'Continued absence' shall be considered to exist when the child lives with each parent for alternating periods of time.

"'Continued absence' does not exist when one parent is physically absent from the home on a temporary basis. Examples are visits, trips or temporary assignments undertaken in connection with current or prospective employment.

"In count 2 of the information, Defendant is accused of having committed the crime of perjury, a violation of Penal Code Section 118.

"Form SAWS 2, titled 'Statement of Facts for Cash Aid, Food Stamps' and Form CW 7, titled 'Monthly Eligibility Report', are permitted by law to be declared or certified 'under penalty of perjury.'

"Factors that may be considered in determining 'continued absence' but are not limited to:

"1. Does the parent provide day-to-day care and control of the child?

"2. Do the parents maintain separate homes?

"3. Do the parents maintain separate mailing addresses?

"4. Do the parents maintain their money separately?

"5. Do the parents have access to each other's income or resources?

"6. Is the parent absent due to hospitalization; attendance at school; visiting; vacationing; or moving or trips made in the connection with current or prospective employment?

"Other similar factors may also be considered. A single factor may not be determinative."

Appellant contends on appeal:

"The Statement of Facts (SAWS 2) form signed by appellant asks, 'Does the other parent ... live with you?' The Monthly Eligibility Report asks in Question 6, 'Did anyone move into or out of your home ...?'…

"Nothing in the forms suggests that the terms 'live with' and 'move in' are used in any sense other than their ordinary senses. The Rights and Responsibilities form uses the same terms and does not provide any definition of them. Consequently, the terms are properly understood in their ordinary sense. This is the rule in the interpretation of contracts....

"In contrast to these ordinary terms, the term 'continued absence' is a technical term used in Welfare and Institutions Code section 11250 ... to define eligibility for welfare aid....

"Special Instruction D, which is based on regulations promulgated under section 11250, elaborates on the term 'continued absence.'…

"Comparison of 'continued absence' to 'live with' and 'move in' or their opposites shows there is no clear relationship between these terms. While in many cases it may be true that a parent who is not 'living with' the other

parent is also 'continually absent' from the other parent's home, this is not a necessary relationship. Special Instruction D permits a finding that a parent is not continually absent because, for example, he provides day-to-day care of the child and has a mailing address at the other parent's home, even though these facts are not enough to establish 'living with' in even a loose, non-domiciliary sense of that term. [¶]...[¶]

"Once the jury asked for the definition of 'continued absence,' the court should have understood there was a substantial risk the jury would improperly use the technical term to determine whether Johnson had 'moved in' with appellant or was 'living with' her. … [T]here was testimony that tended to link the terms, and the court had inquired of counsel about confusion of the terms. In the circumstances, the court should have instructed the jury, at a minimum, that the definition of 'continued absence' was not relevant to Count 2, the perjury count.

"This confusion of terms may well have affected the jury's findings of the elements of perjury that the declaration must be false and the defendant must know it is false. If the jury found that appellant's declarations that Johnson had not 'moved in' with her and did not 'live with' her were false, on the grounds that the jury found that Johnson was not 'continually absent' as defined in Special Instruction D, the jury found elements of perjury on a legally incorrect basis.

"To fail to prevent such confusion in the face of reasonable grounds to believe it might occur was a denial of due process. The confusion went to the elements of the charged offense. The court was aware of the likely confusion. To allow the confusion to exist was contrary to the court's sua sponte obligation to instruct on the elements of the charged offense.... [¶]...[¶]

"... Here, in view of the evidence, the court's earlier recognition of the possibility for confusion, and the jury's current request for an administrative definition of uncertain application, the court should have instructed the jury that 'continued absence' was not relevant to the perjury count."

We initially note defense counsel requested the trial court give Special Instruction D. Where a defendant joined in requesting a jury instruction he or she is precluded from attacking the correctness of the instruction on appeal. (*People v. Jackson* (1996) 13

Cal.4th 1164, 1223; *People v. Hardy* (1992) 2 Cal.4th 86, 152.)[1] Anticipating the preclusive effect of such precedents, appellant goes on to argue that counsel's failure to request a clarifying instruction constituted ineffective assistance:

> "Defense counsel did not request an instruction that Special Instruction D was not relevant to the perjury count. Failure to do so was ineffective assistance that deprived appellant of his right to counsel. (U.S. Const., 6th and 14th Amends.) [¶]...[¶]
>
> "Defense counsel's failure to request an instruction that 'continued absence' was not relevant to the perjury count undoubtedly fell below an objective standard of reasonableness. ... Special Instruction D had no application to the perjury count, but there was testimony that suggested it did. And, it was much easier to prove that Johnson was not 'continually absent' than that he was 'living with' appellant. Competent counsel would have guarded against improper use of Special Instruction D.
>
> "... There could not have been a tactical reason for failing to request a limiting instruction. Defense counsel wanted Special Instruction D as a defense to the charge of welfare fraud. Its value as a defense would not have been impaired by a further instruction that 'continued absence' was not relevant to the perjury count. Counsel was aware of the testimony tending to confuse the terms, and he must have realized it was easier to prove that Johnson was not 'continually absent' than that he was 'living with' appellant, so that appellant was at risk of improper conviction of perjury if Special Instruction D was misused. In these circumstances, where the record reveals there could be no rational tactical reason for the

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[1] Appellant attempts to blunt the impact of such precedents by citing to *People v. Marshall* (1990) 50 Cal.3d 907, 931-933 and *People v. Wickersham* (1982) 32 Cal.3d 307, 332-333, disapproved on another point in *People v. Barton* (1995) 12 Cal.4th 186, 201. In *Wickersham,* the Supreme Court stated: "Even where counsel has suggested an erroneous instruction, the doctrine of invited error is not invoked unless counsel articulated a tactical basis for the choice." (*Wickersham, supra,* at pp. 332-333.) Appellant's trial counsel did so in the instant case, arguing in favor of the special instruction: "And I think it goes right to her [appellant's] state of mind, absolutely her state of mind which is at issue here. Was she deliberately specifically intending to commit fraud? And that definition I think goes right to her state of mind when she's filling out those monthly eligibility reports and those annual reports."

> decision, the issue of counsel's incompetence can be resolved on appeal.... [¶]...[¶]
>
> "... [U]nder Special Instruction D, the jury could have found that Johnson was not 'continually absent' based on nothing more than child care and mailing address, but these facts are insufficient to prove he had 'moved in' and was 'living with' appellant. Thus, the absence of a limiting instruction lightened the prosecutor's burden. Failure to give a limiting instruction denied appellant due process.…"

A defendant claiming ineffective assistance of counsel under the federal or state Constitution must show both deficient performance under an objective standard of professional reasonableness and prejudice under a test of reasonable probability of a different outcome. (*People v. Ochoa* (1998) 19 Cal.4th 353, 414.) To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless counsel was asked for an explanation and failed to provide one or unless there simply could be no satisfactory explanation. (*People v. Hart* (1999) 20 Cal.4th 546, 623-624.)

An appellant bears the burden of proving ineffective assistance of trial counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) In demonstrating prejudice, an appellant must establish that as a result of counsel's failures the trial was unreliable or fundamentally unfair. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. (*In re Visciotti* (1996) 14 Cal.4th 325, 352.) As the United States Supreme Court has observed, the prejudice component of ineffective assistance focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. (*Lockhart v. Fretwell* (1993) 506 U.S. 364, 372.) A reviewing court will find prejudice when a defendant demonstrates a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in

the outcome. (*People v. Gurule* (2002) 28 Cal.4th 557, 610-611; *In re Neely* (1993) 6 Cal.4th 901, 908-909.)

A claim of ineffective assistance will not be accepted on direct appeal unless the appellate record makes clear that the challenged act or omission was a mistake beyond the range of reasonable competence. (*People v. Montiel* (1993) 5 Cal.4th 877, 911.) If a defendant has failed to show the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance at trial was deficient. (*Strickland v. Washington* (1984) 466 U.S. 668, 697.)

As noted above, the trial court gave CALJIC No. 7.21 (perjury under "penalty of perjury"—defined) as follows:

> "Defendant is accused in Count 2 of having committed the crime of perjury, a violation of Section 118 of the Penal Code. Every person who declares under penalty of perjury in any of the cases in which a declaration under penalty of perjury is permitted by law willfully states as true any material fact which he or she knows to be false is guilty of the crime of perjury in violation of Penal Code Section [118]. [¶]...[¶]
>
> "The term 'material' is defined elsewhere in these instructions, and that's special instruction number C which I will read later.
>
> "It is alleged that the defendant made the following false statements: One, the other parent of the children did not live with her; two, no one moved into or out of her house.
>
> "In order to prove this crime, each of the following elements must be proved beyond a reasonable doubt: One, a person declared under penalty of perjury and willfully stated as true a matter which was false. The declaration under penalty of perjury was made in circumstances permitted by law and was signed by the defendant and was delivered to another person by the defendant with the specific intent that it be uttered or published as true; three, the defendant knew the statement was false and was being made under penalty of perjury; four, the false statement was material; and five, the defendant in making the statement had the specific intent to declare falsely under penalty of perjury."

The court also instructed the jurors in CALJIC No. 7.24 (perjury—willfulness and knowledge required) as follows:

> "Perjury requires that the statement be made willfully by a person who knows that the statement is being made under penalty of perjury and who knows or believes the statement is false. A statement made under actual mistake and in belief that it is true is not perjury even though the statement is false.
>
> "The word 'willfully' simply means a purpose or willingness to commit the act or make the omission referred to."

Finally, the court instructed the jurors in CALJIC No. 7.25 (all charges of perjury need not be proved) as follows:

> "When a defendant is accused of having made more than one perjured statement, it is necessary to prove that she made at least one of the statements. All the jurors must agree upon the same statement."

An appellate court will credit jurors with intelligence and common sense and does not assume those virtues will abandon them when presented with a trial court's instructions. (*People v. Coddington* (2000) 23 Cal.4th 529, 594, disapproved on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) This is the crucial assumption underlying our constitutional system of trial by jury—that jurors generally understand and faithfully follow instructions. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.) Here, CALJIC No. 7.21 clearly limited the basis for the perjury charge to two allegedly false statements, neither of which entailed the term "continued absence." CALJIC No. 7.24 required the jury to find that appellant made a statement or statements willfully, under penalty of perjury, and in the belief or knowledge of the falsity of the statement or statements. CALJIC No. 7.24 also informed the jury that a statement made under an actual mistake and in a belief as to its truth is not perjury, even though the statement is false. Had the jury found that appellant sincerely made an actual mistake in the completion of the forms and believed in the truth of her statements, then the

instructions would have required the jury to acquit. (*People v. Webb* (1999) 74 Cal.App.4th 688, 695-696.)

This case was fact driven, did not turn on esoteric legal principles, and it was not probable that appellant would have achieved a more favorable result had counsel requested an instruction that "continued absence" was irrelevant to the perjury count. In requesting that the trial court give Special Instruction D, defense counsel reasonably argued the instruction went to appellant's state of mind in seeking aid, i.e., whether she deliberately and specifically intended to commit fraud in the preparation of the Statements of Facts and Monthly Eligibility Reports. Counsel's performance did not render the result of the trial unreliable or somehow make the proceeding fundamentally unfair. Appellant's claim of ineffective assistance of counsel must be rejected.

DISPOSITION

The judgment is affirmed.

_____
HARRIS, Acting P.J.

WE CONCUR:

_____
WISEMAN, J.

_____
LEVY, J.